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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 29

F. J. [illegible], INC., PETITIONER

v.

LITTLE LAKE LUMBER COMPANY, A/K/A LITTLE LAKE LUMBER CO., A PARTNERSHIP, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 879

F. P. BAUGH, INC., PETITIONER

v.

LITTLE LAKE LUMBER COMPANY, a k a LITTLE LAKE LUMBER CO., a partnership; UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1-5, R. 23-28) is reported at 185 F. Supp. 628. The opinion of the court of appeals (Pet. App. 6-14) is reported at 297 F. 2d 692.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15) was entered on October 18, 1961. Petitioner's

petition for rehearing was denied on December 4, 1961, and its petition for reconsideration and for rehearing *en banc* was denied on December 18, 1961. The petition of the United States for clarification or rehearing was denied on January 17, 1962 (Pet. 4-5). The petition for a writ of certiorari was filed on April 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal tax lien under Section 6321 of the Internal Revenue Code of 1954 for taxes assessed against a partnership, notice of which was filed pursuant to Section 6323 of the 1954 Code on the official Treasury form provided therefor, which listed the name of one of the partners on the line provided for "Name of Taxpayer" and listed the name of the partnership, with address, on the line provided for "Residence or Place of Business," and which was indexed by the County Recorder under both the name of the individual partner and the name of the partnership, is valid as against a subsequent mortgagee of property of the partnership.

2. Whether a recorded notice of federal tax lien for taxes for which a partnership and individual partners are liable, which names one of the partners, gives the tax lien priority over a subsequent mortgage on partnership property to the extent of the named partner's interest in the partnership property.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject

to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice * * *.

* * * * * *

(b) *Form of Notice.*—If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

* * * * *

STATEMENT

On November 23, 1955, the District Director of Internal Revenue at San Francisco, California, made an assessment against Little Lake Lumber Company, a partnership consisting of C. E. McCulloch, Jr., H. W. Bryan, and M. L. Kramer, for withholding and Federal Insurance Contributions Act (FICA) taxes for the third quarter of 1955 in the amount of $18,255.09. On January 13, 1956, the District Director filed a Notice of Federal Tax Lien on U. S. Treasury Form 668 with the County Recorder of Mendocino County, California, in the amount of $18,-

255.09, covering the assessment. (Pet. App. 1-2, R. 29-30.)

Upon the Notice of Federal Tax Lien (Form 668), on the line designated "Name of Taxpayer," was written "Charles E. McCulloch, et al.," and immediately below this name, on the line designated "Residence or Place of Business," was written "Little Lake Lumber Company, Box 271, Willits, California" (R. 19, 20, 30; Pet. App. 19). On the same date, January 13, 1956, the Notice of Federal Tax Lien was indexed in the General Index—Grantors, Defendants, etc., by the County Recorder of Mendocino County, as to Charles E. McCulloch on page 43 of Book L-M, and as to Little Lake Lumber Company on page 79 of Book L-M (R. 20, 30).

Payments aggregating $13,566.45[1] subsequently were received by the District Director from the partnership and were credited to the assessment of November 23, 1955. At the time of the trial, therefore, there remained an unpaid balance due on the assessment of $4,388.64, plus statutory interest (R. 20-21, 30-31).[2]

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[1] The payments listed in the stipulation (R. 21) aggregate $13,566.15, and the stipulated difference of $4,388.61 between the amount of the original assessment and the total credits (R. 21) may be reconciled only if a payment or payments aggregating $300 had been omitted in listing the payments credited against the original assessment.

[2] On the basis of the evidence at trial, the district court found that payments of $100 and $1,000, which had been credited to taxes for another period, should have been credited to the November 23, 1955, assessment. These credits left a balance due on the assessment at the time of judg-

On April 25, 1956, subsequent to the filing of the Notice of Federal Tax Lien on January 13, 1956, petitioner F. P. Baugh, Inc., made a loan to Little Lake Lumber Company, the taxpayer, in the amount of $45,000.[3] The loan was secured by a deed of trust and chattel mortgage, recorded on April 30, 1956, upon property of Little Lake Lumber Company. On August 6, 1956, petitioner made a further loan to the taxpayer in the amount of $37,000.[4] This loan was secured by a chattel mortgage, recorded on August 22, 1956, upon property of the taxpayer. (R. 31.)

The present action was brought by petitioner in the Superior Court of California in the County of Mendocino, by the filing of a summons and complaint to foreclose the mortgages, naming Little Lake Lumber Company, the United States, and others as defendants (R. 5-15). It was removed to the United States District Court for the Northern District of California by the United States pursuant to 28 U.S.C. 1444 (R. 3-4).

In its findings of fact (R. 30) and conclusions of law (R. 33-34), the district court found that the Notice of Federal Tax Lien filed on January 13,

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ment, and for which judgment was entered for the United States, of $2,988.61, plus statutory interest. (R. 21-22, 32, 33-34, 36.)

[3] At the time of trial, $34,500 was still due on this loan (R. 31-32).

[4] At the time of trial, $31,000 was still due on this loan (R. 31-32).

1956, was valid under Section 6323(a) (*supra*, pp. 3-4) as against the subsequent mortgagee, and that the United States was entitled to judgment in the sum of $2,988.64 (see n. 2, *supra*) for unpaid taxes secured by the lien, to be paid out of proceeds of the foreclosure sale before any payment to the mortgagee.

The court of appeals, in its opinion filed October 18, 1961, reversed the district court in part, holding that the notice was insufficient to perfect the lien against the appellant "as to the interests of the partners H. W. Ryan and M. L. Kramer in the partnership property" (Pet. App. 12). It also held, however, that "a valid lien was created against the interest of McCulloch in the partnership on January 13, 1956, the date of the filing of the notice," which was superior to petitioner's lien (Pet. App. 14).[5]

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[5] This alternative was not urged by the government. But petitioner's reply brief, filed before the argument, contained the following (p. 13):

> The United States also argues that the appellant should be charged with notice of the tax lien because "anyone sufficiently familiar with the Little Lake Lumber Company to lend it the amounts of money here involved would know before the transaction was concluded that Little Lake Lumber Company was a partnership composed of Charles E. McCulloch et al." It also contends that, "the entry of Little Lake Lumber Company, Box 271, Willits, California" on the line designated "'Residence or Place of Business' would suggest a close connection between the two * * *" (Br. 20).
>
> Conceding these two facts, for the sake of argument, the notice of lien filed in this case would indicate merely that the interest of the partner in the partnership assets was subject to the lien. The lien, according

Petitioner filed a petition for rehearing with the court of appeals in November 1961, contending that the lien attached to McCulloch's interest in the partnership, but did not attach to real property vested in the partnership. The petition for rehearing was denied on December 4, 1961. On December 7, 1961, petitioner filed a motion for reconsideration of the denial of its petition for rehearing and a petition for rehearing *en banc*. On December 18, 1961, the court of appeals denied the petition for reconsideration, stating (Pet. App. 14): "The interest of McCulloch subject to the lien is his full interest in the partnership property free and clear of other partnership indebtedness."

On that date, December 18, 1961, the government had mailed to the court of appeals a "Response to Appellant's Motion for Reconsideration of Order Denying Rehearing and Petition for Rehearing En Banc," which was stated to be "in response to and in support of the appellant's motion." In it, the government requested clarification of the court's ruling with respect to the lien against McCulloch's interest, and also contended that the district court's decision was correct. On December 30, 1961, the government mailed to the court of appeals a "Motion for Rehearing or Clarification of Opinion" requesting

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to its terms, would not reach the partnership title. Since a lien against a partner reaches only his interest in the partnership, and does not attach to partnership property, (*U. S. v. Worley*, 213 F. 2d 509) appellant could reasonably conclude, if it saw the notice of lien, that the title of Little Lake Lumber Company was not encumbered thereby.

that the government's "Response" previously filed be considered as a motion or petition "out of time" for rehearing or for modification or clarification of the court's opinion. On January 17, 1962, the court issued an "Order Denying Motion for Rehearing," which stated: "The motion of the United States for a rehearing or clarification of the opinion is denied."

ARGUMENT

1. The petitioner's petition for rehearing in the court of appeals was denied on December 4, 1961, and its petition for reconsideration was denied on December 18, 1961. The petition for a writ of certiorari was filed on April 16, 1962. No application for an extension of time within which to file a petition for a writ of certiorari was made to this Court. Accordingly, the petition for a writ of certiorari was untimely filed unless the time was extended by the filing of the "Response" and motion of the United States in the court of appeals. But the United States did not file a timely petition for rehearing in the court of appeals. Its "motion" requesting that the previously filed "Response" be considered as a motion or petition "out of time" was denied by the court of appeals on January 17, 1962. Although the order of the court of appeals does not specify the grounds of denial, it does not appear that the denial of the motion was on the merits. See *Pfister* v. *Finance Corp.*, 317 U.S. 144, 150-151. In these circumstances, the petition for a writ of certiorari would appear out of time. See *Federal Trade Commission* v. *Minneapo-*

lis-Honeywell Co., 314 U.S. 206, 210-213; *Bernards v. Johnson*, 314 U.S. 19, 31; *Morse v. United States*, 270 U.S. 151, 153-154; *Bowman v. Loperena*, 311 U.S. 262, 266.

2. As for the merits, the theory on which the court of appeals affirmed in part the decision of the district court is neither advocated nor supported by the United States.[6]

The district court held that the notice of lien was adequate as against the partnership, entered judgment in favor of the United States for $2,988.64 (R. 36), the unpaid balance of taxes still due on the assessment covered by the notice of lien filed January 13, 1956 (see note 2, *supra*), and awarded priority in payment of this amount out of the proceeds of the foreclosure sale. The court of appeals found the notice of lien inadequate as against the partnership but went on to hold that a valid lien was created against McCulloch's partnership interest "free and clear of other partnership indebtedness" (Pet. App. 14). The United States disagrees with the holding of the court of appeals that the notice of lien was inadequate as against the partnership. We have not sought review of that ruling, however, and the priority given the federal lien by that court is in fact adequate in this case to protect fully the government's interest. Should the petition be granted, however, the United States would rely on the rationale of the

[6] As indicated in note 5, *supra*, the theory may have been derived from the language of the petitioner's reply brief in the court of appeals.

district court as a basis for upholding the result reached by the court of appeals.

On the issue of the scope of the lien against McCulloch, the court's statement that the lien reaches his partnership interest, "free and clear of other partnership indebtedness" may be read to hold that a recorded federal lien against one partner has priority over a subsequent mortgage by the partnership. If that is the court's view, we disagree since we believe that a notice of federal tax lien against an individual partner is effective only as to his interest in the net partnership assets, *i.e.*, those remaining after partnership debts have been satisfied. Despite the court's questionable view, its holding is nevertheless limited to the somewhat unusual case where the lien against an individual partner arises from a *partnership obligation.*[1] Accord, *Adler* v. *Nicholas*, 166 F. 2d 674, 679 (C.A. 10th). There is thus no reason to assume that the decision will be extended beyond that situation. In any event, this case does not appear an appropriate one for review by this Court. There is no conflict of decisions and the result can be justified on the ground given by the district court that the notice of lien was adequate as to the partnership.

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[1] Partnerships, as such, pay no income tax but do pay other taxes such as the employment tax here involved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1962.

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